

EXTRACT
OF THE
PROCESS
OF
TREASON,

At the Instance of Sir *James Steuart*,
Her MAJESTIES Advocate;
And as having Special Warrant for
that Effect,

A G A I N S T

James Stirling of *Keir*, and others.

London: Printed in the Year, MDCCIX.

22 Nov. 1709

EXTRACT

OF THE

PROCEEDS

OF

TRINITY



At the Instance of Sir James Stewart
Her Majesty's Advocate
And as having Special Warrant for
that Effect

AND AGAINST

James Stirling of Keir, and others

London: Printed in the Year MDCCLX

It is certain that the Recognition taken before the Pri-
vate Council of Scotland, neither was nor could be in Law
taken upon Oath, and no other Information upon Oath
was taken: yet these Gentlemen were de-
tain'd several Weeks in Newgate, and then sent down to
the Prison in Barbours, where they remain'd till the
twenty fifth Day of November, when they were again in
manner mentioned in the following Part.

TO THE
READER.

IT pleas'd the late Privy Council of Scotland in March
last, to issue out Letters for citeing of several Persons
to appear before them, and the five Gentlemen who are
principally concerned in the following Tryal, were of
that Number.

They all appear'd at the Days to which they were
Summoned, and without any previous Examination, were
committed to the Prison of *Edinburgh*, upon a Warrant,
bearing them to be suspected of Evil Practises against the
Government.

In May thereafter, by a Warrant from the Privy Coun-
cil of *Great Britain*, the Gentlemen were carried from
thence Prisoners to *London*, where, upon their Arrival,
they were Examined and Committed to *Newgate*; and the
Warrant for that Commitment, sign'd by several of the
Privy Council, bore, that the Prisoners were charged with
High Treason upon Oath.

It is certain that the Precognition taken before the Privy Council of *Scotland*, neither was nor could be in Law taken upon Oath, and no other Information upon Oath has ever hitherto appear'd; yet these Gentlemen were detain'd several Weeks in *Newgate*, and then sent down to the Prison in *Edinburgh*, where they remain'd till the twenty fifth Day of *November*, that they were acquit in manner mentioned in the following Tryal.

These Particulars are very shortly set down, because the Gentlemen do not design by this to move any Complaint aganſt particular Persons, but to lay before the World the Hardships they have met with, and the grounds of the Commitment, thereby to introduce a Petition for their Damage and Expence, and that some Law may be made for preventing the like in time coming.

And that the Case may the more plainly appear, this is ſpecially to be noticed, That the Liſt of Witneſſes given out with the Original Indictment, were generally the ſame Perſons who had been Examin'd in the Precognition, and the Oaths of thoſe whom the Lord Advocate deſir'd to be Examin'd at the Tryal, do vouch the following Articles. *First*, That the Gentlemen had no other Arms than the Swords and Piſtols which they ordinarily carried about with them when Traveling, and that ſome of the Gentlemen, and all the Servants (ſave one) had neither Swords nor Piſtols. *Secondly*, That they did not part from their Houſes till *Wednesday* the *Seventeenth* of *March*, three Days after *Sir George Bing* had return'd to *Edinburgh Firth*, from chaſing the *French Fleet* from off the *North Coaſt*, and that the Common Report of that Action had come to theſe Gentlemen while at Home. *Thirdly*, That the Gentlemen kept the High Ways in their Travelling, and reſorted to publick Places and great Towns, ſuch as *Dunkeld*, which lies the contrary way from

from the Coast; and this of it self was sufficient to remove all grounds of suspicion.

It is true, after the four Witnesses, whose Oaths are in the Tryal had deponed, Her Majesty's Advocate did insist, that Major *Grahame*, and the other Persons who in the Indictment are Libelled as Associates, and Accomplices with the Prisoners, should likewise be Examined as Witnesses against them.

The Prisoners, albeit the Objections, why these Witnesses could not be admitted, were obvious, did notwithstanding incline that they should not be proponed, being conscious of their own Innocence, and not doubting the Integrity of these Persons, whom the Lord Advocate would have Examined.

But the Lawyers in Defence, whose Duty did oblige them to manage the Cause after the nicest Rules, in an Affair of so great Consequence, were of another Opinion, and did insist upon these plain Objections. *First*, That the Persons whom the Lord Advocate would now have admitted as Witnesses, were not only Libelled against as *Sacri Criminis*; but further the Libel did bear expressly that as such, they were declared fugitive for the same Crime, and therefore could not be receiv'd as Witnesses, unless they were previously Pardoned and Indemnified, which was consonant to innumerable Precedents in the like Cases, and was truly never doubted to be plain Law in *Scotland*.

And next, these Witnesses were not given out in a List to the Prisoners with the Libel, as the eleventh Article of the Regulations concerning the Justice Court, established by the 16 *Act 3d Session, 2d Parliament, Ch. 2d.* does expressly require.

These Objections were fully argued on both sides, and the Lords Commissioners of Justiciary gave their Opinion, that the Witnesses could not be admitted; so that it would be

be altogether superfluous to insert here the particular Arguments made use of on that occasion ; the Sentence of that August Court, where so many Learned and discerning Judges sit, will be a sufficient demonstration that the Objections were well founded in Law.

Her Majesties Advocate did indeed on this occasion show an extraordinary Concern, as if his Lordship did expect that these Witnesses could have prov'd the Points of the Indictment sustain'd against the Prisoners, but this will appear highly improbable to any Man who understands, That three of the Witnesses, Mr. *Grahame*, Mr. *Seton*, *Tough's* Brother, and Mr. *Steuart*, were in Company with the other Witnesses whose Depositions were taken, and are inserted in the following Tryal, and so could say no more than what those Witnesses had already Deponed ; and for the other Gentleman *James Malcome*, he did not so much as know the Prisoners, and the Advocate had Examined him before the commencement of the Trial, and he had declared that he neither had sent nor received any Message from the Prisoners, and that he had not seen nor heard from his Brother-in-law, Mr. *Grahame*, for several Weeks before the time the *French Fleet* were on the Coast, nor had sent him any Message ; and the Advocate having enquired if he was not aboard of the *French Fleet*, the time they were upon the Coast ; he declar'd he was not, but that being a Merchant to his Trade and dealing in the curing of Herrings, he was expecting a Ship with Barrel-staves, whereof *Alexander Stevenson* was Master, from the Sound, which was to pass by the Port of *Elie*, near the place of Mr. *Malcom's* residence, towards *Leith Road*, who did actually come up next day ; and that he was told by the Skippers and Seamen at that Port, and the Officers of the Custom-House there, that a Ship which was lying off the Port of *Elie*, was Mr. *Stevenson's* Ship ; and therefore having openly hir'd a Boat and gone aboard of that Ship,

Ship, and finding that it was not Mr. *Stevenson's*, Ship as was suppos'd, but a *Flushiner*, as the Master reported to the said Mr. *Malcome*, he immediately returned ashore; and my Lord Advocate being satisfied with the Examination, did not give out Mr. *Malcome* as a Witness before commencement of the Trial, which his Lordship might have done, and would certainly have done, if there had been the least View that Mr. *Malcome's* Testimony could have yielded any probation against the Prisoners.

From what is abovesaid, these Things are manifest. *First*, That supposing these additional Witnesses had been adduced, it is highly improbable that they could have said more than the other four who were Examined. *Secondly*, That these Witnesses who were Examined, did emit their Declarations (though not upon Oath) before the late Privy-Council and others, appointed by their Lordships for taking of the Precognition, and so that which was declar'd by these Witnesses, could be the only ground of the five Gentlemens Imprisonment and Prosecution. And, *Thirdly*, It being likewise evident that the Testimonies of the Witnesses Examined are to be found in the following Trial, did tend rather to the Gentlemen's Vindication, than to load them with any Crime, or the least suspicion of what is laid against them in the Indictment; The Consequence of all which is, That the Accusation was plainly Vexatious, and the Hardships the Gentlemen have suffered upon account of the same, under so Mild and Temperate a Government, are Unparalell'd.

T H E

The PREFACE.

THE Occasion and Rise of the ensuing Tryal is so notorious, that it may be sufficient to Remark, That when in March last, Scotland was Threatned by an imminent Invasion of French Enemies actually upon its Coast; the Five Gentlemen Prisoners, after Designed, with others their Complices, such as, Major William Grahame, George Seton Brother to the Laird of Touch, Alexander Stewart Uncle to Ardvorlich, and one Hay alias Fleeming Brother to the Earl of Wigton, were Reported to have got together, and Convened in Arms with their Servants and Dependents, making Sixteen or Eighteen in Number, and that they Marched most Suspiciously from Place to Place, in the Shires of Stirling, Perth, and others Adjacent; Whereupon the then Council of Scotland thought fit to Enquire in the Matter, by Examining all such as could give any Light and Evidence therein; and by these Examinations, the Gentlemens Convening in Arms, and Trooping together from Place to Place, was sufficiently Declared. And further, the publick Fame was, That they were got together in Correspondence with the Invaders, and waiting for the Pretender, as was likewise Witnessed by some others at that Time Examined.

These Things moved the then Council of Scotland to Charge them to Compear; and the Five after-mentioned Compearing, when their other Associates withdrew and absconded, they were Secured, and thereafter by Order Carried to London, where the Examinations taken against them being Considered, They were sent back Prisoners to Scotland, in order to abide their Tryal; Of which Tryal the Extract from the Records of Justiciary follows.

CURIA

and the Laws of this, and all other well Governed
 Realms, The Crime of Treason and Life-Majesty and
 the Treasonable and Unlawful Rising and Continuing
 in Arms, and most Atrocious and Heinous Crimes
 committed by the said Rebels, and the Estate of

the said Rebels, taken by the Act of Parliament,
 The 1. Geo. 3. 1790. That no Person, who
 is a Rebel, shall be a Peer, or a Member of
 the House of Commons, and by the Act of Parliament,

CURIA JUSTICIARIA, S. D. N. Regina
 Tenta in Novo Domo Sessionis Burgi de Edin-
 burgh, Decimo quinto die mensis Novembris
 millesimo Septingentesimo Octavo per Nobilem
 et potentem Comitem Georgium Comitem de Cromertie,
 &c. Justiciarium Generalem; et Honorabiles viros
 Adamum Cockburne de Ormiston Justiciarium Cle-
 ricum, Dominos Joannem Lauder de Fountainhall,
 Gulielmum Anstruther de Eodem, et Gilbertum Eliot
 de Minto, Magistrum Robertum Steuart de Tilli-
 coutrie, et Magistrum Jacobum Erskine de Grange,
 Commissionarios Justiciarum Dict. S. D. N. Regina.
 Curia legitime affirmata.

Intran.

James Stirling Laird of Keir.

Archibald Seton Laird of Touch.

Archibald Stirling Laird of Carden.

Charles Stirling Laird of Kippendavie, and

Patrick Edmonston of Newtown.

INdited and Accused at the Instance of Sir James
 Steuart Her Majesties Advocate, for Her Highness
 Interest, and as having Special Warrant from Her Ma-
 jesty for that Effect. That where, By the Law of GOD,

B

and

and the Laws of this, and all other well Governed Realms, The Crime of Treason and Lese-Majesty, and the Treasonable and Unlawful Rising and Continuing in Arms, are most Atrocious and Heinous Crimes, Punishable by Forfeiture of Lands, Life and Estate, or other Pains of Law. Likeas, by the Act of Parliament, Ja. 1. Par. 1. Cap. 3. It is Statute, That no Man, openly Rebel against the King's Person under the pain of Forfeiture of Life and Goods. And by the Act of Parliament, Ja. 2. Par. 6. Cap. 24. It is Statute, That who commit Treason against the King's Person, or Majesty, or who Rise in Feire of Weir against him, shall be punished as Traitors. And by the Act of Parliament, Charles 2. Par. 1. Sess. 1. Cap. 3d. It is Declared to be High Treason for the Subjects more or less upon any pretext, to Rise and Continue in Arms; And to make Treaties or Leagues with Foreign Princes, or States, or among themselves, without His Majesties special Authority first interponed. And by the Act of Parliament, Char. 2d. Par. 1. Sess. 2d. Cap. 2d. It is Statute, That if any Person shall Plot, Contrive or Intend Death and Destruction to the King, or Bodily Harm tending thereto, or Deprive, Depose or Suspend Him from the Stile, Honour and Kingly Name of this, or any other His Majesties Dominions, or Levy War, or take up Arms against Him, or any Commissionate by Him, or entice Strangers or others to Invade any of His Dominions, and Express and Declare such Treasonable Intention, He shall be Adjudged a Traitor, and punished as in the case of High Treason. Likeas, by the Act of Parliament, 1702. Intituled, Act Recognizing Her Majesties Royal Authority, It is Declared, That it shall be High Treason in any of the Subjects of this Kingdom, by Writing, Speaking, or any other manner of way, To Disown, Quarrel, or Impugn Her Majesties Royal Power and Authority, or Right and Title to the Crown. And by the Act

Act of Parliament, 1703. Instituted, Act Asserting and Recognizing Her Majesties Authority, It is again Statute and Declared, That it shall be High Treason in any of the Subjects of this Kingdom, To Disown, Quarrel or Impugn Her Majesties Right and Title to the Crown of this Kingdom, or Her Exercise of the Government thereof. NEVERTHELESS, It is of verity, That the said James Stirling of Keir, Archibald Seton of Touch, Archibald Stirling of Carden, Charles Stirling of Kippendavie, and Parrick Edmonston of Newtown, all and each of them were Guilty of the said Crimes, in sua far as, They all, and each of them, shaking off all Fear of GOD, and Regard to Her Majesties Person, Authority and Laws, upon one, or other of the Days of the Months of February, March, or April last, when an Invasion of that part of Great Britain called SCOTLAND, was Threatned by an Enemy-Fleet of Ships with Forces, and an Army Aboard, sent by the French King, or by the Pretender, who went some time by the Name of The Prince of Wales, And now assumes to himself, The Name, Style and Title of King James, as King of Her Majesties Dominions, with an manifest and open Design to Invade Her Majesties Dominions, and to Destroy Her Majesty and Her Good Subjects, at least to Deprive and Depose Her Majesty from the Style, Honour and Princely Name of these Her Dominions, Did Convocate and Conveen in Arms with others their Accomplices, such as Major William Grahame, Alexander Stewart Uncle to Ardworlich, George Seton Brother to the said Archibald Seton, and Mr. Charles Fleeming alias Hay, Brother to the Earl of Wigtoun, all since absconded, and upon the same Account Declared Fugitives; And thus did Rise and Continue in Arms without Her Majesties special Authority first interponed, and did Levy War and take up Arms against

Her Majesty. And farther, they having never before Qualified themselves by any Mark of Good Affection to Her Majesty or Her Government, Did at the time foresaid, gather themselves together with their Accomplices in Arms, with Swords and Pistols, and other Offensive Weapons, in an open Correspondence with the said Enemies and Invaders at the very time of their said Invasion; And being so Convocate and Conveened in Arms, Did March in one Body or Company with their said Accomplices several Days and Nights, to and from several places in the Shires of *Stirling*, *Perth*, and other Shires adjacent, on purpose to Encourage and Strengthen the said Invaders, or at least to raise Her Majesties other Subjects in Rebellion against Her. Likeas for that End, They did openly Drink to the Good Health of their Master, as they called him, who could be none else, but the said Pretender. And did by their said Rising in Arms, and open Correspondence with Her Majesties said Declared Enemies, and otherways, entice them and others to Invade Her Majesties Dominions, to the Destroying of Her, and Her Good Subjects; At least to Deprive and Depose Her from the Style, Honour and Princely Name of Queen and Sovereign of this and Her other Dominions; Or at least, thereby endeavour the Alteration of the Right of Succession to the Crown, so happily by Law settled, upon Her Majesty and Her Successors. By all which, They and each of them were Guilty, Art and Part of the foresaid Crimes of Treason, Rebellion and Lese-Majesty, at least of Treasonable Rising and Conveening in Arms, without Her Majesties special Authority first had thereto; At least of a most Unlawful Convocation in Arms, in a most Dangerous and Threatning Season, and in open Correspondence with the said Enemies and Invaders, to the Destruction of Her Majesties Government, and of the

the Quiet and Peace of Her Dominions ; Which Crimes, all, or any of them being found Proven against all, or any of the fore-named Persons, by the Verdict of an Affize before the Lords, Justice-General, Justice-Clerk, and Commissioners of Justiciary, They, and each of them ought to be Condemned by Sentence and Doom of the said Lords Commissioners, to Forfault their Lands, Lives and Goods as Traitors, and be other-ways Punished in their Persons and Goods, by the Pains of Law, to the Example and Terrour of others to Commit the like in time coming. *Sic Subscri-*

bitur. **Ja. Steuart.**

Pursuer.

Procurators in Defence.

Sir James Steuart of Goodtrees,
Her Majesties Advocate.

Sir Patrick Home,
Sir David Forbes,

Mr. William Carmichael one of
Her Majesties Solicitors,

Sir James Steuart,

Sir Walter Pringle and

Mr. Alexander Mcleod,

Sir Francis Grant, Advocates.

Mr. James Grabame,

Mr. Walter Steuart,

Mr. John Elphinston,

Mr. Coline Mckenzie,

Mr. Charles Cockburne, and

Mr. David Lauder, Advoc.

My Lord Advocate, judicially produced Her Majesties Letter, Authorizing and Requiring his Lordship to Raise, and Insist in the aforesaid Process, whereof the Tenor follows, *Superscribed* thus. ANNE R. Right Trusty and well Beloved, We Greet you well. Whereas James Stirling Laird of Keir, Archibald Seton Laird of Touch, Archibald Stirling Laird of Carden, Charles Stir-
ling.

' *ing Laird of Kippendavie, and Patrick Edmonston of*
 ' *Newtown, Were about the time of the late intended In-*
 ' *vasion, Apprehended by Warrants for Suspicion of*
 ' *Treason, and Treasonable Practices against Us, and Our*
 ' *Government; And have since been Committed by*
 ' *Warrants for High Treason, Depositions upon Oath*
 ' *having been made against them; Our Will and Pleasure*
 ' *is, And We do hereby Authorize and Require you to*
 ' *raise a Process in the Ordinary Form, before the Com-*
 ' *missioners of Justiciary against them, and each of them,*
 ' *for the Treasonable Practices wherewith they, or any*
 ' *of them are, or shall be Charged; And herein you are*
 ' *to take the Assistance of Sir David Dalrymple, Mr.*
 ' *William Carmichael, Sir Walter Pringle, and Sir Francis*
 ' *Grant Advocates, or any Two of them if necessary,*
 ' *and who are hereby Required to Concur with you ac-*
 ' *cordingly, For all which this shall be your Warrant.*
 ' *Given at Our Castle at Windsor, the Nineteenth Day of*
 ' *July 1708, in the Seventh Year of Our Reign. By Her*
 ' *Majesties Command, Subscribed thus, SUNDER-*
 ' *LAND. Directed on the Back thus, To Our Trusty and*
 ' *well Beloved Sir James Steuart Our Advocate for Scot-*
 ' *land. Which being Read in presence of the said Lords,*
 ' *Justice-General, Justice-Clerk, and Commissioners of*
 ' *Justiciary, They Ordained the same to be Recorded. Sic*
 ' *Subscribitur.*

Cromertie I. P. D.

25 Thereafter, there was a *Petition* presented to the said
 Lords, by *James Stirling of Keir, Archibald Seton of*
Touche, Archibald Stirling of Carden, Charles Stirling of
Kippendavie, and Patrick Edmonston of Newtown, humbly
 shewing, That the Petitioners being Indited at the In-
 stance of Her Majesties Advocate, for the Crimes of
 Treason and Lese-Majesty; And this being the Day of
 their

their Compearance and Tryal, They had according to the Privileges allowed to all the Liedges, and Confirmed by Acts of Parliament, made choice of the following Lawyers, to appear before their Lordships in their Defence, *viz.* Sir Patrick Home, Sir David Forbes, Sir James Stewart, Mr. Alexander Mcleod, Mr. Walter Stewart, Mr. James Grahame, Mr. Coline Mckenzie, Mr. Charles Cockburne, and Mr. John Elphinston. And it being also usual in Cases of Treason, That Lawyers are publicly Authorized and Warranted to Manage the Tryals in their Pannels Defence: Therefore humbly craving, Their Lordships would be pleased to allow of the Petitioners Choice of the Lawyers above-mentioned, and to Authorize these Gentlemen accordingly, as the said Petition bears. Which being Consider'd by the said Lords, They, by their Deliverance thereon allowed such Advocates as the Pannels should think fit to imploy to Appear and Debate for them in the above-mentioned Indictment, they being already sufficiently Authorized by Law for that Effect. *Sic Subscribitur,*

Cromertie I. P. D.

The said Indictment being Read, and fully Debate *viva voce*, in presence of the said Lords, Pannels and Affizers, The said Lords, Justice-General, Justice-Clerk, and Commissioners of Justiciary, Ordained the Pannels to give in their Information thereon, betwixt and *Wednesdays* Night next, And Her Majesties Advocate to give in his betwixt and *Fridays* Night thereafter in Order to be Recorded, And continued the Dyet till *Monday* next at Nine a Clock in the Forenoon, and Ordained the whole Affizers and Wirnesses to attend then, each of them under the pain of One Hundred *Merks*, and the Pannels to be carried back to Prison.

INFOR-

their Compearance and Trial, They had according to
the Privileges allowed to all the Judges and Counsellors
of the Parliament, made choice of the following
Counsellors, to appear before their Lordships in their De-

INFORMATION

For the Laird of Keir, and others,
AGAINST
Her Majesties Advocate.

IT is alledged for the Pannels, denying always the
Indictment, and hail Articles and Qualifications
thereof. 1770. That the Indictment is not Relevantly
Libelled, in respect it does not condescend upon any
ouvert Act or Deed done by them, that could possibly
be stretched to infer the Pains libelled, and the Acts of
Parliament libelled on, expressly require such Facts and
Deeds to infer the pains of Treason therein-mentioned:
As the Act 3d. Parliament 1. James 1. That none Rebel
openly or notourly. And the Act 14. Parliament 6. James
2d Bears, And if it happens any within the Realm openly,
or notourly against the King to Rebel, or makes War against
the King's Leidges, against his Forbidding, &c. And the
Act 2d. Sess. 2d. Parliament 1. Charles 2d has these
Words, And shall by Writing, Printing, Preaching, or
other malicious and advised Speaking, exprest or declare such
their Treasonable Intentions, &c. And the Act 1702. bears
That it shall be High Treason by Writing, Speaking, or any
other manner of way to Disown or Impugn Her Majesties Royal
Authority, &c. Which Laws, and generally all Laws,
als well as the nature of Crimes, require that the same
should

should be by express *Words, Writs or Deeds*, and not strained by remote Inferences and Conjectures: And in the present Case, there is neither *Words, Writ or Deeds* condescended on, that could possibly be drawn to infer the Crimes Libelled.

2do. Whereas the Indictment bears, That the Pannels did Convocate and Convene in Arms, with others their Accomplices, and so did rise and continue in Arms, without Her Majesties special Authority first Interponed; And did Levy War, and take up Arms against Her Majesty, &c. It is answered, That albeit Levying War against Her Majesty, or Rising and Continuing in Arms without Her Majesties Authority, be undoubtedly Treason when duly Qualified: Yet there is no Circumstance of Fact, Word or Write condescended on in the Indictment, that can be imagined to infer a rising in Arms, or Levying War against Her Majesty: And albeit the Law Statutes anent Rising in Arms or Levying War generally: Yet in all Libels duely founded thereupon, the Subsumption must condescend upon particular Facts and Deeds, capable to be found and construed a Rising in Arms. The common Law expresses it thus, *Qui injussu Principis bellum gesserit delectumve habuerit, exercitum comparaverit*. And our Law Act 75. Parl. 9. Q. Mary, Explains what it is to rise in Arms, viz. *That no manner of persons attempt to do, or raise any Band of Men of War, or Horse or Foot with Culverings, Pistolets, Picks, &c. or other Munition bellical whatsoever, for Daily, Weekly, or Monthly Wages, in any times to come, without special Licence in Write had of our Sovereign Lady, and Her Successors thereto*. And Sir George Mackenzie in his Observation on Act 2d. James 1st. Defines Rising in Arms thus, *The Rising of Men in Warlike manner by Mustering them, or forming them in Companies, or Swearing them to Colours*. Nor are these Qualifications by themselves sufficient, unless there be a formidable Number. And therefore he cites
C the

the Case of *Mleod of Affint* the 2d. February 1674, where the Lords of Justiciary refused to sustain the Articles wherein it was libelled, the raising of Men and disposing of them under Colours to be relevant, except it were alledged, That they were an Hundred Men or upwards, and were under Colours, or Mustered under Weekly or Daily Pay; Whence it is evident, that the Rising in Arms, must be by publick and nottourt Appearance of Companies in Arms, so as their Design and Opposition to Authority could not be doubted, whereof the least shadow cannot be alledged in this case.

3th. Whereas the Libel bears further, That the Pannels did gather themselves together with their Accomplises in Arms, with Swords and Pistols, and other Offensive Weapons, in an open Correspondence with the said Enemies and Invaders, at the very time of the Invasion. It is Answered, That the said Article anent Correspondence is not relevantly Libelled, there being no particular Condescendence of any Acts of Correspondence past betwixt the Pannels and the Enemy, as is necessary to be condescended on for inferring the Crime libelled; Correspondence with the Enemy in the common Law, is thus exprest, *Quive hostibus nuntium literasve miserit, signumve dederit feceritve dolo malo quo hostes consilio juventur.* And no such Fact or Qualifications can ever be pretended or alledged in this Case; And their meeting together so few in Number of near Relations and Neighbours, as it were lawful for them to do at all times, so the accidental Circumstance of an Imminent Invasion could never render the same Unlawful, nor could their Travelling together for some space in the Countrey, be strained to any design of encouraging Enemies, or to raise the Subjects in Rebellion, whilst they were no otherways Appointed or Attended, than as they and othe s of their Character do usually Travel in a most peaceable manner, without giving the least occasion by
Word

Word or Deed, to any Rebellion or Sedition. And as there was not then any Body of Men in Arms in the Kingdom, against Authority, to whom they could be imagined to Resort; so it is an Evidence that they had no mind of Convocating themselves against Authority, that they did not use the means in their power by Convocating their Tenants and Followers in Arms, either for Assisting themselves, or giving Countenance and Encouragement to others on any such Designs.

4^{to}. Whereas the Libel mentions, That the Pannels did openly drink to the Good-health of their Master, as they called him; who could be none else but the Pretender. It is no ways relevant, *imo*. Because the drinking of any Persons Health is not a Crime, there being no Law against it. 2^{do} There is no Person named whose Health is said to be Drunk, and therefore cannot infer any Crime; And the Gloss put thereupon, That it could be no other but the Pretender, is only a Conjecture and uncertain Inference of the Pursuers, which can be no wise sufficient to fix a Crime upon others, who can only be answerable for what is clearly expressed and declared by them, by plain Words, Writes, or Deeds.

It was Replied for the Pursuer, *imo*. That the Libel was most relevant, in so far as it did expressly bear, That the Pannels did rise and continue in Arms, without Her Majesties special Authority first interposed, and the said *Act 5th. Parl. 1st. Cha. 2d. Declares it Treason to the Subjects, or any number of them more or less upon any ground or pretext whatsoever, to rise and continue in Arms without his Majesties special Authority*; And the particular Qualifications and Circumstances of their said rising in Arms, will appear from the Probation.

2^{do}. The Pannels rising in Arms, leaving their own Houses, and Marching in a Body through the Shires of

Stirling and *Perth*, in Company with the other persons mentioned in the Libel, whereof some have been since Denounced for not Compearance, to underly the Law therefore, at the same time that the Nation was Threatened by an Invasion of a *French* Fleet, with Land Forces Aboard, cannot be understood to be upon any other Design, than on purpose to Encourage and Strengthen the Invaders, and in open Correspondence with them, especially whilst the Pannels can adduce no reasonable Cause for their so Convocating and Travelling together; And this was sustained Treason in *Caldwel's* case.

3^{to}. The Laws libelled on, do not only make actual Rising in Arms, and Levying War against the Sovereign, to incur the Crimes and Pains of Treason, but likewise any Attempt so to do; For any Attempt or *Conatus* in the case of Treason, is to be punished with the same pains as the consummate Crime, as the Law says, *Eadem enim severitate voluntatem sceleris quæ effectum puniri Jura voluerunt*; And Attempts are reckoned as Treason in the Acts above-mentioned.

4^{to}. The Libel bearing Art and Part, is sufficiently relevant, notwithstanding the Generality thereof, such Libels being expressly ordained to be relevant by the Act of Parliament 151. *Parl. 12. Ja. 16th.* So that no Objection can be sustained against the Libel as Irrelevant, upon the account of the Generality thereof, since Art and Part is libelled, which takes off any Objection, for not particularly condescending upon the Pannels Accession to the Crimes libelled.

It is Duplyed for the Pannels to the *First*, That albeit the Rising in Arms without Authority be mentioned in General, to infer the Crime of Treason, since the Law could not descend to every particular Qualification, that might happen to infer Rising in Arms to be Treason, but left the same to be Determined by the Judges competent; Yet the Pursuer of a Criminal Libel must

must adduce special Qualifications, and circumstantiate matter of Fact, that may be sufficient to infer, That the Pannels did Treasonably rise in Arms, or otherways the Libel cannot be sustained. For as it could not be allowed to libel in General, That a person is guilty of Murder, so no more can it be allowed to libel in General, That a person is guilty of rising in Arms without Authority ; The Propositions in these Libels being equally founded in Law, but the Subsumption must be cleared and qualified by circumstantiate Matters of Fact, inferring the respective Crimes, and if it were otherways, these evident Inconveniencies would follow.

As *1mo* That the Pannels would be deprived of the benefit of Exculpations, which could not easily be brought to meet with general Libels, whereas special circumstantiate matters of Fact, might have been more readily taken off by proper particular grounds of Exculpation, whereby the Deeds condescended on, might be applied to other reasonable Causes, that might wholly exclude the *animus delinquendi*, or *dolus* requisite in all Crimes.

2do. This Inconveniency would likewise be inevitable, That the Affize would become Judge of the Relevancy as well as of the Probation. For if the Libel bearing in General, the Pannels to be guilty of rising in Arms, against Authority, should be sustained, and the Qualifications left to be Determined by the Probation, then the Affize would be Judges both of the Relevancy and Probation; For they behoved to Determine, whether the Qualifications arising from the Probation, did amount to a Rising in Arms, or other Crimes, generally mentioned in the Statute, whence it might come to pass, that Pannels might be put to the knowledge of an Inquest upon irrelevant Crimes, and therefore Crimes should be particularly subsumed, as Sir George Mackenzie observes in his *Criminals Tit. Libels*, page 465.

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To the 24. its Duplyed, That whether the Pannels Travelling for some space from their own Houses, either for Diversion or Business, in the most peaceable manner imaginable, had happened in the time of the threatned Invasion or not, could never alter the nature of that Deed, since it cannot so much as be pretended, that they were *versantes in illicito*: the Travelling in such a peaceable manner singly with Domestick Servants, being unquestionably allowed by Law. And this Defence of the Pannels Travelling in their usual manner, and with their ordinary Equipage, was so evident of it self, that the Pursuers acknowledged there could nothing culpable be inferred from it at other seasons, but that the Crime now insisted on, was founded, in that their Meeting and Travelling was the time of the threatned Invasion, when a Fleet of Enemies Ships was upon the Coast; And yet the Libel does not bear, That the Pannels knew of any such Design, or that the French were actually upon the Coast, and without this knowledge, the Circumstance which the Pursuers insist chiefly to make the Crime was, as to the Pannels, no Circumstance at all. So that the Libel shortly resolves in the Pannels Travelling with their ordinary Equipage, after their usual way, in a peaceable manner, which neither in common Sense, nor in the Construction and Interpretation of our Law, and Opinion of our Lawyers above-mentioned, can be pled a Rising in Arms against Her Majesty or Government, or give the occasion of the least suspicion of any Intention that way: neither can suspicions, albeit there had been more evident grounds for them, be sufficient to infer a Crime, the Law saying expressly, That *ex suspicionibus nemo est damnandus*, Leg. 5. ff. de Pen. And whereas it is pretended, that the Pannels have given no reasonable account of their Progress and March at that time, and therefore leaves
place

place for the Pursuers Conjectures, the same is noways of any weight to fortifie the Pursuers Libel; it being sufficient for the Pannels to alledge, That the meeting of a few Gentlemen, and Travelling with Swords and Pistols as they were hitherto used, does not infer a Rising in Arms; And to pretend that the Pannels should give special Accounts of their Progresses, is plainly to found a Criminal Charge or Libel *super inquirendis*, and so expressly discharged by Law: And doubtless it is sufficient for the Pannels to say, that their Meeting or Travelling together with such small Retinue, and in such peaceable and unprovided manner, could not give the least Jealousie to any person whatsoever, and if this Defence were not sustained, the natural Liberty of the Liedges would be very much Circumscribed, and no Man could be sure, but the action of his Life which he intended should be most Innocent, should be the most Fatal, as concluding him under Treason and the worst of Crimes. And the Practique in *Caldwel's* case is greatly differenced from this, in that there was a considerable Body of Men with all sorts of Arms actually in Rebellion against the Government at the time, and that *Caldwel* with his Associates, likewise of a considerable Number, had intercepted common Posts, and particularly some Letters to the Earl of *Eglintown* a Privy Counsellour, which was an Ouvert Act, and sufficiently declared their bad Design, besides these Sentences were reduced, and the persons restored *per modum Justitie*.

To the 3d. it is Duplyed, That albeit it be generally received by Lawyers, that Attempt or *Conatus* in Treason is punishable as Treason: yet that is never to be understood of a naked design or *actus animi*; The Law saying expressly, that *Cogitationis penam nemo patitur Leg. 18. ff. de Pen. and neminem qui male facere voluit plecti equum*

equum est nisi quod factum voluit etiam fecerit. But that *Voluntas* or *Conatus* mentioned in Law, must break out into an external Act, if not consummating the intended Crime, at least inchoating the same, so as to become a Deed obvious to the external senses, before it can be subjected to the Censure of humane Laws. And albeit *Dolus* or *Proposuitum* be requisite in all Crimes, yet not as it is latent in the mind, but as it is expressed and declared by an external act. And so *Matthews de Crim. in Proleg.* says, *Dolo contrahi crimen diximus, per delum autem factum dolosum intelligimus*; As it is clear by the express Statutes libelled upon, particularly the said Act 2d. Sess. 2d. Parl. 1st. Ch. 2d. That Treasonable Intentions should be expressed and declared by Writing, Printing, or advised Speaking, before the same can be said to have inferred the pains mentioned in the Act; yea, even where there was Writing alledged upon, yet in Mr. Robert Caddel's Case, that was not found sufficient to infer the Crimes in the Statute, unless it should have been qualified, that the Writing was published and out of the Writer's Hands, whereby the Attempt would become manifest, and in the case of an Overt Act, which was the Point upon which *Balmerino's* Tryal proceeded; and without which, no Crime could have been found against him. And in the present case, as the Pannels had truly no manner of ill Design, so no external Act whatsoever is, or can be condescended on, either of Word or Deed, that infers any design of the Pannels to oppose Authority, or act any thing contrair to Law, or their Duty to the Sovereign; for as they used their Natural and Innocent Liberty of Travelling in a peaceable manner with their near Relations and Neighbours, for their Diversion or Business, so when they were called by Authority they did not absent or withdraw themselves, but readily appeared and gave Obedience, upon the first Citation.

To

To the *Fourth*, it is Duplyed; That the Libelling of Art and Part, is not sufficient to exclude the Objection upon the Generality of the Libel, because Art and Part relates to the particular Criminal Facts, and Qualifications thereof libelled, and includes an Alternative, that the Person complained upon, was either Actor, or Art and Part of the Criminal Facts and Deeds particularly libelled: Which general and indefinite Qualification of Accession, Law and Custom has not allowed, without a more special Condescendence of the Parties Accession to the Deeds libelled, which could only be certainly and distinctly known by the Probation; But still That does not take off the necessity of special Condescendences of the Qualifications that make up the principal Crime libelled, without which Pannels could not have the Benefite of Exculpations, nor could the Relevancy be determined by the Judges, but remitted with the Probation to the Assize, which always has been cautiously Shunned as of Dangerous Consequence: And in the present Case, the sustaining of the Libel in the Generality thereof above-mentioned, would be a most dangerous Preparative, it being Evident, That if a few Gentlemen Meeting, and Travelling together with their ordinair Retinue and Equipage, which is generally with Swords and Pistols, could be thought to fall under the Act of Parliament, of Rising in Arms without the Sovereigns Consent, no Gentleman of the Kingdom could be Free from Grounds of a Criminal Process, if the bearing such Weapons should be construed a Rising in Arms, and Few or Many making no difference as the Pursuer contends, it would necessarily follow, That two or three Persons meeting or travelling with Swords or Pistols might be lyable to a Process of Treason, as rising in Arms without Authority, which were most absurd, and of dangerous consequence to the Lidges: And as no Company can ever be found to have

met and travelled in a more peaceable and inoffensive manner than the Pannels have done, doing no Injury by Word or Deed, to any Person whatsoever, and travelling in such a simple manner, as did exclude all imaginable Jealousy, of their having any Warlick Designs, or creating the least Disturbance to themselves or others, and giving a ready Obedience when called by Authority on a simple Citation: So they ought to be Affoizied from the said Groundless and Irrelevant Libel.

The Pannels shall not take up the Lords time in Informing more particularly upon the other Circumstances of the Libel, such as Drinking of Healths, Correspondence and Enticing of the Countrey, by reason that My Lord Advocate, did not insist upon these in the Debate, but only pretended to have libelled them as Aggravations, which is of no Moment in a Proceſs of Treason, and can be of no manner of Effect in this Case, where the Crime libelled is so manifestly elided. *Sic*

Subſcriber,

Alexr. McLeod.

INFOR.

INFORMATION

For Her Majesties Advocate!

AGAINST

*The Lairds of Keir, Touch, and others,
now Prisoners in the Tolbooth of Edin-
burgh.*

HER Majesties Advocate, holding the Inditement as repeated, and here premised, before he offer to Answer and Remove the Exceptions and Objections made against it for the Defenders; takes Leave to Remember what cannot well be Forgot, That the occasion of the present Tryal was an actual Invasion of an Enemy-Fleet, with *French, Irish, and Popish* Forces Aboard, in *March* last, Threatning an Imminent upon Our Coast to Destroy Her Majesty, and all Her Good Subjects, and Ruine Our Religion, Laws and Liberties.

Which Invasion was the more formidable, That it was intended and carried on by *Papists* and *French*, and by *Irish Papists*, the Dregs of both, which are certainly the worst Characters that can be apprehended in an Enemy.

While we stood thus Threatned by such Enemies that had risen up against us, and were ready to Swallow us up Quick, So that the Waters had Overwhelmed us, and

the Stream had gone over our Soul, if GOD had not appeared for us; And Her Majesty, by His Blessing upon Her careful and most vigilant Conduct, interposed for our Delivery, and when the Enemy was upon our Coast, and ready to enter our *Firth*, and when all good Men were in the greatest suspense of the sadest Apprehensions of what might ensue, by turning our Countrey at least to a Field of Blood, and Scene of all Confusions and Mischiefs: Yet there were found amongst us, even among *Scots* Protestants, a Knot of Men who may justly seem to have wished and longed for that which all Men besides feared.

It is now indeed made an Argument to exculpate, That they were so few, and yet it may far more reasonably be Wondered, That there was so much as one Man to be found of such a Desperate Resolution and Practice.

The Five Gentlemen now in the Pannel, being of the Knot mentioned, so soon as this Invasion was noised Abroad, and when it was brought just upon our Coast, then they think fit to leave their Houses, and going with their *Homes* and Servants, and all well Armed with Swords and Pistols, and other Invasive Weapons, They rise and continue in Arms, without any lawful Authority interposed: And thus appearing in Arms, and Marching from Place to Place in several Shires, and for several Days and Nights, as it were in Correspondence with the fore-said Invaders, did what in them lay, (if not to rise to their Assistance at least) to Disturb Her Majesties good Subjects, from the Opposition and Defence that was at that time so Necessary.

Its true, when their Hopes were disappointed, then they shrunk Home, and such of them as had more to Lose than they knew how to save other ways, Compeared and Rendred when called, while others of them that had no more Guilt, but less to Lose, thought fit to Retire and Abscond:

Abscond: Whereupon Her Majesty most justly Ordered, That the Persons now in the Pannel should be brought to this present Tryal.

The Inditement Exhibite against them, founds upon most plain and positive Laws and Acts of Parliament, That none Rebel openly against the King's Person or Government; That none Levy War and take up Arms against the King and His Government; And that for any of the Subjects more or fewer to Rise and Continue in Arms upon any pretext, or to attempt the same without His Majesties special Authority first interponed, it shall be High Treason; and that if any Levy War, or take up Arms against the King, or intice Strangers or others, to Invade, and Express and Declare such Treasonable Intentions, He shall be Adjudged a Traitor, and Punished as in the case of High Treason. And then the Inditement subsumes in the very Terms of the Law, That at such a time, and in such a manner, and with the other Circumstances mentioned, The Defenders did actually Rise and Conveen, and continue in Arms without Her Majesties special Authority first interponed, which in Law is justly construed to be the Levying of War, and taking up Arms against Her Majesty, and did plainly appear to be in a real Correspondence with, and for the Encouragement of the French Invaders, whom thereby, and otherways they did Intice to the Invading of Her Majesties Dominions, and the Destroying of Her and all Her Good Subjects; Of which Crime the Defenders being Actors, Art or Part, ought to be Punished with the Pains of Law.

To this Indictment, The Defenders made Answer, Denying the Crime libelled with all its Qualifications, That the Indictment is not Relevant, in Respect it doth not Condescend upon any Ouyert Act or Deed, that can be stretched to Infer the Crime, or any Treasonable Intention; And that all the Acts of Parliament libelled
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upon, require such open Facts and Deeds ; And the *Act of Parliament*, K. Char. 2d. Par. 1. Sess. 2. Requires expressly, *That by Writing, Printing, Preaching, or other Malicious and Advised Speaking, such Treasonable Intentions should be Expressed or Declared*, Nothing of which can be found in this Case.

To which it is Replied, 1^{mo}. That it is granted, That neither inward Thoughts nor Intentions, unless some way Expressed or Declared can be made Criminal, and far less Treasonable ; But on the other Hand, when the Law and Acts of Parliament does set down a specific palpable Deed, such as Rising and continuing in Arms, which is visibly an open Overt Act, and requires no more for the Declaring of the Rebels Intention, save his so Rising and Continuing in Arms, without having Her Majesties Authority interponed ; what more can be Required, either as to the Overt Act, since the Fact it self is truly and openly such, or as to the Certainty of the Parties Intention when the Law hath Ascertained it, viz. By the want of Authority, which is plainly the present Case ? But 2^{do}. It is to be adverted, That our Old Laws libelled upon, do indeed bear open and nottour Rebellion : As likeways, *The Levying of War against the King and his Person and Government* : But these Laws having been found lyable to the very Exceptions that the Defenders now make against the Indictment, when in the Year 1661, this came to be Considered, and the Parliament Judged fit to Ascertain and Define the Crime of Treason, so as every Man might most plainly understand it, and that there could be no place for any of the former Evasions, The Act of Parliament condescends upon Rising and Continuing in Arms, as the very open and Overt Act requisite to the Crime, and withal fixes the Treasonable Intention, upon this one Qualification, That the Rising and Continuing

tinuing in Arms, is without His Majesties Authority interponed, a Negative that proves it self, and requires no other Evidence. *3tio.* As to what the Act of Parliament, *Char. 2. Par. 1. Sess. 2. Cap. 2.* Requires, *That such Treasonable Intentions should be Expressed and Declared,* these Words are plainly subjoyned to a long Enumeration of several points and kinds of Treason, and are certainly only to be applyed to the Cases wherein the Intention may be doubtful, but can never in any Good Sense or Reason be applyed to such Deeds, as the Law it self Declares to be open, and to Import the Intention, such as Rising and Continuing in Arms, Levying of War, or Taking up Arms, where both the Deed and the Intention are manifest, and by Law Declared and Condemned; And in effect to alledge, where there is an open Rising in Arms, or a Levying of War, or the Maintaining a Fort or Garrison, That yet the Intention should be desiderate, where the Law requires no more to prove, but that it is done without Authority, is visibly absurd.

Secondly, Where it is Objected, that albeit Rising and Continuing in Arms without Her Majesties Authority be undoubtedly Treason, yet it must still be Qualified by some Circumstances of Fact, Word or Write to infer the Intention; And to libel Rising in Arms is but General, and it ought to be cleared by some particular Fact and Deed libelled, to make the Rising Criminal; Thus the common Law says, *Qui injussu principis bellum gesserit, delectumve habuerit exercitum Comparaverit, &c.* And our Act of Parliament, *Q. Mary,* explains the Matter, viz. *That no Man Raise Bands of Men of Weir on Horse or Foot, with Pistols and other bellical Arms, for Daily or Monthly Wages without special Licence, &c.*

To all which it is Answered, That is Granted by the Defenders, That Rising and Continuing in Arms,
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if duly Qualified to be against Her Majesty, is undoubtedly Treason: But then is it not as evident; That all the Qualification that the Act of Parliament requires is, That the same be done without Her Majesties Authority; So that where the Qualification is so plainly Defined, to Require any farther, is to Impose on the Law. Its true, that the Act Queen Mary speaks of Raising of Bands of Men of Weir, and keeping them under Pay, and the Common Law may also have something of that Nature; But if the Act of Parliament 1661. thought fit so far to Secure the Prerogative, as to Cut short and forbid all Rising in Arms without Her Majesties Authority, under the pain of Treason, is not this plain Law, which the Defenders could neither misken, nor ought to have Transgressed?

The Case of *Affint* is much insisted in, That it was not found to be a Treasonable Rising, unless there had been more than an Hundred Men conveyed, and Mustered under Colours and Pay. But 1^{mo}. A Practick cannot Change the Law; 2^{do}. The Reason of that Practick is manifest, viz. That *Affints* Convocation was covered with another Colour and Pretext, and was certainly not against the Government; and therefore the said Qualifications were required, which doth no ways hold in this Case.

For to Deal plainly, and to cut off all the Defenders Groundless Pretexs, That they were only Innocently Conveened; That they had no Arms, but such as are Ordinary and Allowed to Gentlemen in their Travelling, That they were only a small Number of Friends and Neighbours for their Diversion and Recreation, That they had no Correspondence with the Invaders, tho' their Meeting and Travelling together happened about that Time. And *Lastly*, That if they should be Overtaken on the Fact and Deed libelled against

against them, none could be in Safety to Travel with Arms, even in the smallest Company.

To all this it is Answered, 1^{mo}. For all that the Defenders have alledged or can alledge for Excuse, yet their Meeting and Marching in Arms, at the Time and Manner that they did, is generally under this Prejugee by all that ever heard it, That it was at least the height of Folly, and had the worst of Appearances.

But 2^{do}. If the Defenders would have the Deed to be considered with all its Circumstances, it is not declined; now as to the Deed it self, it is open and palpable, viz. Rising and Continuing in Arms. 2^{do}. It has all the Qualification that Law requires to make it Criminal, viz. That it was without Her Majesties Authority being Interponed. But 3^{tho}. Admit of all the Circumstances that the Defenders can alledge for alleviating, are they not only bare Supposition and Question? What if they meet by Re-encounter? What if they met for Diversion? Are not such Meetings ordinary? And what was acted by them against the Government? All which do not import so much as one positive colourable Excuse, whereas to consider the Deed certainly condemned in Law on the other side with its undeniable Circumstances, viz. That the Defenders left their own Houses, having no just Occasion to invite them Abroad, That they met in such a Company as perhaps all of them never met before, That they met well mounted, and with Swords and Pistols of all sorts, better appointed than most Men that go to War; That they were thus well Mounted and Armed, beyond what the Law and Act of Parliament 1693, allows to Men of their Fashion, there being none of them Qualified to the Government; That all this happened when the Invasion was Generally known and just upon our Coast. That they Marched backward and foreward for several Days and Nights, as it were Hovering in expecta-

tion of what they look'd after, That they did not at all Dissolve and go Home, until their hope of the Invasion was lost; and that since severals of them have Absconded. Can any Man lay and reflect upon these things together, but he must say, That besides their being clearly Guilty in the Terms of Law, as having Risen and Continued in Arms without Her Majesties Authority, which in the Construction of Law, is to Levy War against Her Majesty, their Intention was as Treasonable as the Law presumes; So that upon the whole, this Judgment may be both righteously and safely past in this matter, viz. That their Rising and Continuing in Arms at the Time and in the Manner, and with the other Circumstances libell'd without Her Majesties Authority first interponed, was Treason, unless they could Exculpate, by at least some colourable or probable Pretext, which they never can prove, or have so much as alledged. Nor could a Judgment of this Nature so clearly founded, be of the least ill Consequence or Inconvenience, since every ordinary Meeting bears its own Excuse, nor can indeed a lawful Meeting of this sort be found without Excuse; And further, it would secure the Government according to the true Intention of the Law, against all suspicious and evil Designs, and Attempts in time coming.

The Defenders object, That the Indirement doth not libel relevantly as to the point of Correspondence with the Invaders, which should be qualified by a Condescendence on the particular Acts of Correspondence; and as the Common Law expresses it, That *Hostibus nuntium literasve miserunt, signumve dederunt, feceruntque dolo malo quo hostes consilio juvantur.*

To which it is Answered, if Correspondence with Invaders, had been the principal Crime libell'd, the Defenders might have contended for such a Condescendence *quo modo*, they corresponded; But when the Correspondence

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dence is only libelled, *viz.* an open and real Correspondence, by their Rising at the same time in Arms without Authority, that a Foreign Enemy was actually Invading; This real Correspondence or this Correspondence *in re ipsa*, is more than sufficient to make out the Presumption of Law, *viz.* That their Rising and Continuing in Arms without Authority, was plainly against Authority. If at the time of the Invasion, some Hundreds of Disaffected Persons had got together in Arms, would it have been doubted, but that their getting together at that time in Arms, without Her Majesties Authority, was really to Correspond with the Invaders, and to Countenance and Encourage them in their Invasion. If then all the difference be, That the Defenders did Convene in a smaller Number, it only remains to be considered, that the Act of Parliament doth expressly declare against any Number, their Rising and Continuing in Arms without Authority, and that the same is Treasonable, which fully reaches the Number libelled.

As to what is added of their being so small a Number, and only Armed in the ordinary manner accustomed by Gentlemen Travellers, It is already answered, and withal it is certain, that the greatest Mischiefs may have their Rise from small Beginnings. And as for the Defenders, they were very early in their Appearance, and visibly did what in them lay, both to encourage the Invaders, and to raise an Insurrection in the Countrey; and it was only the Goodness of GOD, and Her Majesties vigilant Conduct, that cut off both their further hopes, and the increasing of their Numbers, which might have been infallibly expected, if the Invasion had succeeded.

The Defenders take notice of that part of the Inditement, which alledges, That they did openly drink the Good-health of their Master, who could be none else but the Pretender, which they alledge is noways relevant to infer the conclusion of the Libel.

To which it is Answered, That the foresaid Drinking having been only mentioned in the Libel, for a further Illustration of the Defenders Intentions; It is granted that *per se*, it is not relevant to infer a Crime. But 2^{do}. Being joyned with the other Circumstances above-mentioned, even in its doubtful sense, it cannot be denied to import a further Discovery of these Gentlemens Intentions, in Appearing and Continuing in Arms without Authority, which in effect is the principal Crime, sufficiently declared by the Act of Parliament it self, tho' it were not adminiculate by this and the other Circumstances above-mentionnd.

The Defenders go on to Resume and Answer the Charge brought against them; but the whole of the matter being above abundantly cleared, it may suffice to notice, that they still insist, That the Rising in Arms libelled without Authority, is but General, and so could not infer the Crime of Treason, unless more particularly qualified; whereas it is certain, that the Rising in Arms is a specifick Act, and of the which if libelled circumstantiately as to Time and Place, as it here is, makes a most particular Libel; and for qualifying the Intention of the Act, and of the Risers, all that the Law requires is, That the Rising and Continuing in Arms be without Her Majesties Authority first interponed, which in the Construction of Law, is to Levy War against Her Majesty.

The Defenders alledge, that to libel Rising in Arms in General, is no better than to libel Murder in General; But if Murder be libelled circumstantiately as to the Person Murdered, and the time and place, the Libel is no doubt particular and relevant, without any further Qualification; What then should hinder, why Rising and Continuing in Arms circumstantiately libelled as to Time and Place, and plainly qualified as the Law requires, *viz.* Without Her Majesties Authority, should not also be a particular and relevant Libel of Treason? But

But the Defenders say, That by such a Libel they are deprived of the benefite of Exculpation; But this is wholly groundless, it having been often said, That if the Defenders can but qualifie any probable Pretext for their Rising and Continuing in Arms without Authority, to take off the Presumption of the Law, it should be admitted; But when they can qualifie no Pretext, nor can assign the least probable Cause for their Rising and Continuing in Arms, as they did, except it was to Countenance Invaders, or to raise Insurrection within the Countrey; How is it possible that this their Rising in Arms without Authority, as is libelled, should not be Treason? Nor is there any thing here left to the Judgment of the Assize, save most plain and palpable matter of Fact, viz. That the Defenders Rose and Continued in Arms, which being qualified as the Law requires, viz. That it was without Her Majesties Authority, it inevitably presumes the Treasonable Intention, which being further joyned with the Circumstances mentioned in the Inditement, cannot but evince to all Men, That the Rising and Continuing in Arms without Authority, and in the Circumstances above mentioned, was an Overt Act of Rebellion, specially when nothing is, or can be adduced, to give it a more probable Interpretation.

The Defenders insist much, That they were not *versantes in illicito*, That they only went out for Diversion or Business, with their ordinary Arms and Servants; but what can be more *Illicitum* than to Rise and Continue in Arms without Authority, the very Deed forbid by the Law as Treasonable? And what need of any further Qualifications of their Intention, since the Law makes, without Authority, to be sufficient? And Inditement doth also superadd most pregnant Circumstances to verifie their ill Intention, which are not so much as offered to be Cancelled, except by what if this? or what if that? which plainly signifie nothing.

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The Defenders seem to insinuate, That they did not so much, as know there was an Invading Fleet upon our Coast; but it is so nottous, that at that time the Invasion was Universally known, and likewise signified by a Proclamation, That this Alledgeance is manifestly Disingenuous.

But the Defenders further alledge, *Esto*, That Raising and Continuing in Arms, as they did, was suspicious, yet Suspicious cannot found a Libel of Treason; But the Defenders advert not, That it is not matter of Suspicion that is objected, far less their Travelling with their ordinary Horses, Arms and Equipage, as formerly they were wont; but plainly, that at such a time when the Countrey was openly Invaded by a Foreign and most Formidable Enemy, they being never qualified to the Government, should have run together in Arms without Her Majesties Authority, which is all that the Law requires to make them guilty, and which in effect with the other Circumstances libelled, declares their Treasonable Intentions to a Demonstration:

The Defenders say, That their Case differs from *Caldwells*: But albeit they may vary in some Circumstances, yet its certain, That, as to the main, *Caldwell* and his Complices were found guilty of Treason only for their Raising of about Thirty or Fourty, and Continuing in Arms without Authority, when there was another Party in the Country engaged in an open Insurrection. So that the Defenders having in like manner, Risen and Continued in Arms without Authority, when there was a far more dreadful Enemy Imminent upon our Coast, cannot but fall under the same Construction; And that *Caldwell's* Proceß and Doom was afterwards reduced, signifies nothing, since it was reduced, for Reasons wholly different and alien from the Case in hand, and which are so well known, as they need not be repeated.

The Defenders do also endeavour to take off what was alledged from the Act of Parliament, That even the Attempt

tempt and *Conatus* in this Case is condemned, by telling us, That this *Conatus* doth also require an Ouvert Act. But *Esto*, it be so, what more Ouvert Act can be required, than open Rising in Arms? and what doubt can there be of the Intention and Design, when both the Act of Parliament, and the other Circumstances of the Deed, do so fully clear it? And therefore it is in vain to notice either *Caddel's* Case, wherein there was indeed no Sentence, or yet *Balmerino's* Case, where the Ouvert Act was thought to be doubtful, when the Rising and Continuing in Arms, is, in this Case, an Act both Ouvert in it self, and expressly defined to be such by the Act of Parliament.

The Defenders are at some pains to make it believed, That the libelling of Art and Part cannot sustain this Inditement. But *imo*. The Advocate adheres to his Inditement as libelled and qualified with Art and Part. 2^d. Tho' Art and Part be libelled, and the Act of Parliament makes it a Supplement for relevancy in all cases; yet Her Majesties Advocate finds no Necessity to enter further into that Debate, than to Adhere as above, seeing that his Inditement is founded on clear Law, and that he as clearly subsumes in the Terms of Law, *viz.* The Rising and Continuing in Arms without Her Majesties Authority interposed, the Levying of War, and taking up Arms against Her Majesty, and open Corresponding with Her Majesties Enemies and Our Invaders, and that not only by the above-mentioned real Correspondence, but even by Enticeing them otherways to Invade, as shall be proven if needful: All which are too manifestly Acts and Deeds of Rebellion, to need the Constructive Support of Art and Part, further than that Actor, Art and Part are perpetually Connected together.

And therefore, upon the whole, since, as hath been said, the Country was, at the time Libelled, in the most Imminent Hazard of a most Destructive Invasion; And that, at that very Time, the Defenders to the great Surprise
and

and Astonishment of all Her Majesties Good Subjects, Did flee out in Arms, and Conveen and March, and Troop together in Arms, without Her Majesties Authority, which in Law is sufficient, and that with the other aggravating and most concludent Circumstances above-libelled, which were not offered to be taken off with any Rational or Probable Pretext; It appears to be without Question, That the Defenders fall under all the Conclusions of the Libel, And ought to be made Lyable in the Pains thereof. *In Respect whereof, &c.*

Sic Subscribitur, Ja. Steuart.

CURIA JUSTICIARIA, S. D. N. Regina
Tenta in Nova Sessionis Domo Burgi de Edin-
burgh, Vigesimo secundo die mensis Novem-
bris millesimo Septingentesimo Octavo per No-
bilem et potentem Comitem Georgium Comitem de Cro-
mertie, &c. Justiciarium Generalem, et Honorabiles viros
Adamum Cockburne de Ormiston Justiciarium Cle-
ricum, Dominos Joannem Lauder de Fountainhall,
Gulielmum Anstruther de Eodem, et Gilbertum Eliot
de Minto, Magistrum Robertum Steuart de Tilli-
countrie, et Magistrum Jacobum Erskine de Grange,
Commissionarios Justiciarum Dict. S. D. N. Regina.
Curia legitime affirmata.

Intran.

James Stirling of Keir.

Archibald Seton of Touch.

Archibald Stirling of Carden.

Charles Stirling of Kippendavie, and

Patrick Edmonston of Newtown.

Indired and Accused at the Instance of Sir James Steuart
Her Majesties Advocate, and as having special Warrant
from Her Majesty for that Effect, for the Crime of Trea-
son

son and Life-Majesty, in manner mentioned in the Inditement raised against them thereanent.

Pursuers.

Sir James Steuart Her Majesty's
Advocate.
Sir Walter Pringle and
Sir Francis Grant, Advocates.

Procurators in Defence.

Sir Patrick Home,
Sir David Forbes,
Sir James Steuart,
Mr. Alexander Mcleod,
Mr. James Grahame,
Mr. Walter Steuart,
Mr. John Elphinston,
Mr. Coline McKenzie,
Mr. Charles Cockburne, and
Mr. David Lauder, Advoc.

The Lords, Justice-General, Justice-Clerk, and Commissioners of Justiciary, having considered the Inditement at Her Majesties Advocate's Instance, against James Stirling of Keir, Archibald Seton of Touch, Archibald Stirling of Carden, Charles Stirling of Kippendavie, and Patrick Edmonston of Newtown Pannels, with the foregoing Debate thereon. THEY FIND, The said Pannels, their Rising and Continuing in Arms without Her Majesties Authority, and actual Corresponding with an open Enemy upon the Coast, ready to Invade this Part of Great Britain called SCOTLAND, Relevant to infer the Pains of Treason libelled, against the Pannels; And Repel the whole Defences proponed for the Pannels, and Remit the Whole to the Knowledge of an Affize. Sic Subscribitur.

Cromertie, I. P. D.

The said Lords, for several Causes and Considerations, continued the Dyet of the said Cause till Three a Clock in the Afternoon, and Ordained Assizers and Witnesses to attend then, ilk Person under the Pain of

One Hundred Merks, and the Pannels to be carried back to Prison.

CURIA JUSTICIARIA, S. D. N.
Post meridiem *Regina Tenta in Nova Sessionis Domo
Burgi de Edinburg, vigesimo secundo die men-
sis Novembris millesimo Septingesimo Octavo
per Nobilem & Potentem Comitem Geor-
gium Comitem de Cromertie, &c. Justicia-
rium Generalem, & Honorabiles viros Ada-
mum Cockburne de Ormiston Justicia-
rium Clericum, Dominos Joannem Lauder
de Fountainhall, Gulielmum Anstruther
de Eodem, et Gilbertum Eliot de Minto,
et Magistrum Jacobum Erskine de Grange,
Commissionarios Justiciarum Dict. S. D. N.
Reginae.*

Curia legitime affirmata.

Intran.

*James Stirling of Keir,
Archibald Seton of Touch,
Archibald Stirling of Carden,
Charles Stirling of Kippendavie, and
Patrick Edmonston of Newtown.*

Indited and Accused at the Instance of Her Majesties Advocate, and as having special Warrant for that Effect, for the Crime of Treason and Lese-Majesty in manner mentioned in the Inditement raised against them thereanent.

Pursuers.

*Sir James Steuart Her Majesties Advoc.
Sir Walter Pringle, and
Sir Francis Grant, Advocates.*

*Procurators in
Defence, ut ante.*

ASSIZE.

A S S I Z E.

*Sir Thomas Young of Rosebank,
John Hamilton Portioner of Newbottle,
William Turnbut of Currie,
James Kinloch of Stonyflats,
James Deans of Woodhouslie,*

*Henry Nisbet younger of Dean,
Sir James Fleeming of Rathobyres,
Sir John Clark of Pennycook,
John Hunter Merchant in Edinburgh,
David Cleland Merchant there.*

*James Gordon Merchant in Edinburgh,
Gilbert Campbell Merchant there,
William Duncan Merchant there,
Alexander Brown Merchant there,
Robert Walwood Merchant there.*

The Affize lawfully Sworn, and no Objection of the Law made by the Pannels in the contrary.

The Pursuer for Probation adduced the Witnesses after Deponing, viz.

Mr. David Fenton in Dunkeld, Aged Fourty. Years or thereby, Married, solemnly Sworn, purged of partial Counsel, Examined upon the Libel, Depones, That about the time Libelled, being about the Twenty or Twenty One of March, tho' he knows not the Pannels Names, yet by their Faces he remembers they were at his House at Dunkeld, some of them two Days, and some but One Day, That two of them that came there on Sunday, went away on Monday Morning, viz. Carden and Kippendavie, and that the Rest went away from his

House on *Tuesday*; Depones, that all of them were in Arms, all of them having Swords, and some Pistols; But he cannot Remember how many pair of Pistols he saw. That nine of them owned themselves to be Masters, and that there were seven Servants, and that he saw no other Weapons, but Swords and Pistols as said is; Depones that all the Masters Lodged in his House; But that the Servants and Horses Lodged in common Stables. Depones, That he did not hear any of them speak of the Government, or the Invasion that was then intended; And that he knows nothing of their Purpose or Design of coming to his House, or why they were together. Depones, that when they went away, some of them went to the East Boat on the Water of *Tay* in the way towards *Perth*, and others of them crossed at the West Boat in the way towards *Strathbrand*. And this is all he knows, and is the Truth as he shall Answer to G O D. *Sic Sub-*
scribitur.

Da. Fenton.

Cromertie.

John Mclearan, Change-keeper at the Bridge of *Turk*, Aged Fourty Six Years and upwards, Married, solemnly Sworn, purged of Partial Counsel, Examined upon the Inditement, and Interrogate, Depones, That about the Fifteenth of *March* last, He saw the Five Pannels at his House, but that he was not at Home when they came, and came Home the next Day; And that he saw with them *William Grahame*, *Alexander Stewart* Brother to *Ardvorlich*, and a Brother of *Tough's*, and Remembers of none others, but some Servants whose Names he knows nor; That they went away from his House the next Morning, and that all of them had Swords, and some of them had Pistols, and saw them have some few Guns, but he knows not how many; Depones, that he was not sent on any Message nor knows of none other there being sent on any Message from his House by the Pannels, and that they
went

went from his House straight Eastward towards *Lenie* ; And that he did not hear them speak of any Person that they expected to meet them at his House ; *Causa scientia patet*, and this is all he knows, and is the Truth as he shall Answer to GOD. And being further Interrogate, if he heard the Pannels speak of the Government, or of King *James*, or the Prince of *Wales*, or of the *French* Invasion, or of their Landing in any Place in the *North*, Depones *Negative* : And this is also the Truth as he shall Answer to GOD. *Sic subscribitur.* WJ. ML.

Cromertie.

Daniel Morrison Servant to the Laird of *Keir*, Aged twenty three years or thereby, Unmarried, solemnly Sworn, purged of partial Counsel, Examined and Interrogate, Depones, That about the time libelled, he saw the Pannels, with some others, to the number of ten or twelve Horse at *Dunkeld*, and at *Appinadove*, and at the head of *Lochearn*, and that they had Swords and Pistols, but no other Weapons that he saw ; Depones, That the first place he saw the Pannels was at a place near the Bridge of *Turk*, and went then to *Appinadove*, and from that to *Dunkeld* ; Depones that he heard, That there was one *Campbell* who Commanded a Party at the Bridge of *Allan*, and that *Keir* being informed thereof, and that they designed to Apprehend him and his Horses, occasioned his going away with his Horses ; and that *Touch* was with him that Morning, and went along with him to *Dunkeld*, and that they met *Carden* and *Kippendavie* at the Bridge of *Turk*, and that *Newtown* came there that Night, and from thence went all to *Lochearn* ; Depones, he heard them speak nothing of the pretended Prince of *Wales*, or of the Invasion then intended, and that *Keir*, *Carden*, and *Touch*, came home together from *Dunkeld*, and that to the best of the Deponents memory, it was on the twenty third of *March* that they were at *Dunkeld*, and that he knows not what

what was the occasion of their parting; and Depones, That it was on the seventeenth of that Month that they went from *Keir*, and Depones, That *Carden* and *Newtown* had neither Sword nor Pistol that he saw, and that none of the Servants had either Pistol or Sword, except *Keirs* Man, who had a Sword; And Depones, that *Touchs* Brother who was in Company, had neither Sword nor Pistol that the Deponent saw; *Causa scientia patet*: And this is the Truth as he shall answer to GOD. And Depones he cannot Write. *Sic subscribitur.*

Cromertii.

Peter Wilson, Servant to the Laird of *Keir*, Aged thirty years or thereby, *solutus*, solemnly Sworn, purged of partial Counsel, Examined upon the Libel, and Interrogate, Depones, That about the Seventeenth Day of *March* last, *Keir*, accompanied with *Touch* and his Brother, and others, to the number of five Horse, came from *Keir*, and were that Night at the Bridge of *Turk*, where *Carden* and *Kippendavie* met them, and went all of them next day to *Appinadove*, where one *Mr. Hay* met them; Depones, That the Occasion of *Keirs* going from his House, was the Apprehensions he had of being Seized with his Horses, by the Forces then lying at *Stirling*, as he heard. Being Interrogate, if he heard the Pannels speak any thing concerning the Government, the Prince of *Wales*, and the intended Invasion, Depones *Negative*, but that they heard, That Admiral *Bing* had chased the *French* Fleet off the Coast, before they went from *Keir*; Depones, That severals of them had Swords and Pistols, but cannot be positive whether *Carden* and *Touchs* Brother had any or not, or if any of the other Servants had any, except the Deponent himself, and that they had no other Weapons that he saw; and Depones, that it was at *Lochearn*, and not at *Appinadove* that *Mr. Hay* met them. *Causa scientia patet*;

*patet; And this is the Truth as he shall answer to GOD.
Sic subscribitur.*

*Patrick Wilson.
Cromertie.*

The Lords, Justice General, Justice-Clerk, and Commissioners of Justiciary, ordain the Affize presently to inclose, and return their Verdict to Morrow at twelve a Clock, in the high Council-house, and the hail fifteen Affizers to be present each of them, under the pain of two hundred Merks.

CURIA JUSTICIARIA, S. D. N. Regina
Tenta in Pratorio Burgi de Edinburgh,
Vigesimo tertio die mensis Novembris mil-
lesimo Septingentesimo Octavo per Nobilem
et potentem Comitem Georgium Comitem de Cromer-
tie, &c. Justiciarium Generalem, et Honorabiles viros
Adamum Cockburne de Ormiston Justiciarium Cle-
ricum, Dominos Joannem Lauder de Fountainhall,
Gulielmum Anstruther de Eodem, et Gilbertum Eliot
de Minto, et Magistrum Jacobum Erskine de Grange,
Commissionarios Justiciarum Dict. S. D. N. Regina.
Curia legitime affirmata.

The said Day, the Persons who past upon the Affize of *James Stirling of Keir* and others, Returned their Verdict in presence of the said Lords, whereof the Tenor follows.

Edinburgh 22d. November 1708.

The above Affize having inclosed, did choise Sir *James Fleeming* of *Rathobyres* their Chancellor, and *Gilbert Campbell* Merchant in *Edinburgh*, to be their Clerk. And having considered the Inditement pursued at Her Majesties Advocates instance, as having special Warrant from Her Majesty

Majesty for that effect, against *James Stirling of Keir, Archibald Seton of Touch, Archibald Stirling of Carden, Charles Stirling of Kippendavie, and Patrick Edmonston of Newtown*; for the Crime of Treason and Lese-Majesty, with the Debate thereupon, the Lords Justice-General, Justice-Clerk, and Commissioners of Justiciary their Interloquitor pronounced thereupon, and Depositions of the Witnesses adduced, *They all in one Voice Find the Libel not proven. In Witness whereof (written by the said Gilbert Campbell) their Presents are Subscribed by our said Chancellor and Clerk, day and date aforesaid. Sic subscribitur.*

James Fleming.
Gilb. Campbell, Clerk

After Opening and Reading of which Verdict of Assize, The Lords Justice-General, Justice-Clerk, and Commissioners of Justiciary, Afforded the Pannels, and dismissed them from the Bar; Whereupon they took Instruments. *Sic subscribitur.*

Cromertie L.P.D.

F I N I S

